PUBLIC NOTICE AND AGENDA
MTC Litigation Committee Meeting

Hilton Mystic
Mystic, Connecticut
July 26, 2004
1:30 p.m. – 3:00 p.m.

I. Welcome and Introductions

II. Public Comment Period

III. Executive Committee Liaison Report and Commentary

IV. Report of the Executive Director

V. U.S. Supreme Court Cases on State Taxes and Federalism since March, 2004.

Supreme Court Decisions

- ***United States v. Galletti,*** U.S. Supreme Ct. No. 02-1389, March 23, 2004. Reversing the 9th Circuit, the Court ruled a proper tax assessment against a partnership suffices to extend the statute of limitations to collect the tax in a judicial proceeding from the general partners who are liable for the payment of the partnership's debts. In this case involving federal employment taxes, the Court held that once the tax has been properly assessed, nothing in the IRC requires the IRS to duplicate its efforts by separately assessing the same tax against individuals or entities that are not the actual taxpayers but are, by reason of state law, liable for the taxpayer's debt. The assessment's consequences--the extension of the limitations period for collecting the debt--attach to the debt without reference to the special circumstances of the secondarily liable parties. Here, the tax was properly assessed against the Partnership, thereby extending the limitations period for collecting the debt. http://a257.g.akamaitech.net/7/257/2422/23mar20041130/www.supremecourtus.gov/opinions/03pdf/02-1389.pdf

- ***Tennessee Student Assistance Corp. v. Hood,*** U.S. Supreme Ct. No. 02-1606, May 17, 2004. Although the Court granted certiorari in this case to address whether the Bankruptcy Clause of the U.S. Constitution granted Congress authority to abrogate state sovereign immunity from suits by individuals in bankruptcy cases, it did not reach that question. Instead, it determined that this suit in bankruptcy court for the discharge of a student loan debt was an *in rem* proceeding which did not implicate a state's sovereign immunity. Thus, the 6th Circuit's denial of the state's motion to dismiss based on 11th amendment

immunity was upheld, albeit on different grounds.
http://a257.g.akamaitech.net/7/257/2422/17may20041215/www.supremecourtus.gov/opinions/03pdf/02-1606.pdf

- ***Tennessee v. Lane,*** U.S. Supreme Court No. 02-1667, May 17, 2004. In upholding the 6th Circuit, the Court ruled that Title II of the Americans with Disabilities Act, which prohibits exclusion of individuals with disabilities from "benefits of services, programs or activities of a public entity," constituted a valid exercise of Congress's authority under §5 of the 14th amendment to abrogate state's 11th amendment sovereign immunity in cases involving due process concerns, such as the right of access to the courts.
http://a257.g.akamaitech.net/7/257/2422/17may20041215/www.supremecourtus.gov/opinions/03pdf/02-1667.pdf

- ***Hibbs v. Winn,*** U.S. Supreme Court No. 02-1809, June 14, 2004. In upholding the 9th Circuit, the Court ruled that the Tax Injunction Act, which prohibits federal courts from enjoining the "assessment, levy or collection" of a state tax when an efficient remedy exists in state court, does not bar suit in federal court to prospectively enjoin the operation of a state tax credit. The Court rejected the argument that "assessment" encompasses all aspects of the entire tax taxing plan, including credits, that result in a final determination of liability. Rather, the Court reasoned that Congress wrote the statute to bar cases in which state taxpayers seek federal–court orders enabling them to avoid paying state taxes. Thus, this suit claiming an Arizona income tax credit for contributions to "school tuition organizations" that provide scholarships to private schools, including religious schools, is a violation of the establishment clause may proceed in federal district court.
http://a257.g.akamaitech.net/7/257/2422/14june20041230/www.supremecourtus.gov/opinions/03pdf/02-1809.pdf**Summary Disposition**

- ***Rendon v. Florida Dept. of Highway Safety and Motor Vehicles,*** U.S. Supreme Court No. 03-559, May 24, 2004. The Court vacated an order of the Florida District Court of Appeals which held that Florida's sovereign immunity against suit in state court was not abrogated by Title II of the Americans with Disabilities Act and that the state could collect a fee for handicapped placards, and remanded the case for re-consideration in light of *Tennessee v. Lane*.

Certiorari Granted, Decisions Pending

- ***Granholm v. Heald*** (Below: *Heald v. Engler*), 342 F.3d 517 (6th Cir., 8/28/03), S.Ct. No. 03-1116 and ***Michigan Beer & Wine Wholesalesrs Ass'n v. Heald*** (Below: *Heald v. Engler*), 342 F.3d 517 (6th Cir., 8/28/03), S.Ct. No. 03-1120 The 6th Circuit has held a state regulatory scheme which prohibited direct shipment of alcoholic beverages from out-of-state wineries, but allowed direct shipment from in-state wineries, was unconstitutional because 1) the regulation violated the dormant commerce clause and, 2) the state could not show that the regulation advances the "core concerns" of the 21st amendment, (promoting temperance, ensuring orderly market conditions, and raising revenue), and that there were no reasonable nondiscriminatory alternative

means of advancing those "core concerns." The decision is consistent with holdings in the 4th, 5th, and 11th Circuits; and inconsistent with decisions in the 2nd and 7th Circuits which have held similar state regulations to be within the ambit of the 21st amendment. Certiorari granted 5/24/04.
http://pacer.ca6.uscourts.gov/cgi-bin/getopn.pl?OPINION=03a0308p.06

The Court also granted cert in ***Swedenburg v. Kelly***, 358 F.3d 223 (2nd Cir., 2/12/04), S.Ct. No. 03-1274. 1) State taxing scheme that allowed in-state, but not out-of-state, wine producers to ship directly to retail customers was constitutional because, consistent with the analysis followed by the 7th circuit, it was within the ambit of the 21st amendment and allowed licensed wineries, whether in-state or out-of-state, direct access to the market provided they established a physical presence in the state. The two-step analysis followed by the 4th, 5th, 6th, and 11th circuits, whereby a statute which facially violated the commerce clause could be saved only if it advanced a "core concern" of the 21st amendment, was rejected because it unnecessarily limited the authority delegated to the states by the 21st amendment. 2) Nor was the Privileges and Immunities Clause violated, because the scheme "operate[d] without regard to residency and [did] not provide [state] residents with advantages unavailable to nonresidents." 3) Statutory prohibition of all commercial speech pertaining to the sale of alcoholic beverages directed to state consumers by unlicensed entities was a violation of the 1st Amendment. Certiorari granted 5/24/04.
http://caselaw.lp.findlaw.com/data2/circs/2nd/029511p.pdf

The Court stated that certiorari in these cases is limited to the question of whether "a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violates the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment."

- ***Sherrill, N.Y. v. Oneida Indian Nation of New York,*** 337 F.3d 139 (2nd Cir., 7/21/03), S.Ct. No. 03-855. In July of 2003, the 2nd Circuit Court of Appeals held that property set aside as reservation land in the late 18th century, later sold to non-members, but reacquired by the Oneida Indian Nation of New York in open-market transactions in the 1990's, was not subject to taxation because, where the federal government had never changed the reservation status of the land, the Oneidas purchases reestablished the properties as reservation land. Certiorari granted 6/28/04.
http://caselaw.lp.findlaw.com/data2/circs/2nd/017795p.pdf

Certiorari Denied

- ***Zelinsky v. New York Tax Appeals Tribunal,*** 801 N.E.2d 840 (N.Y., 11/24/03), S.Ct. No. 03-1177. Although NY apportions income for personal income tax purposes according to a ratio the numerator of which is days worked in NY and the denominator of which is total days worked, taxpayer employed by a New York City university who performed non-classroom

activity at his home in Connecticut was required to apportion all income to New York under the "convenience of the employer" rule which treats days worked away from NY as days worked in NY if taxpayer's work away from NY is for taxpayer's convenience and not a necessity for the employer. The taxpayer's crossing of state lines to work at home did not impact upon any interstate market in which residents and nonresidents compete so as to implicate the Commerce Clause. Even if the commerce clause were implicated, the "convenience of the employer" rule met the dormant commerce clause's fair apportionment requirement of external consistency because all income was derived from NY sources and it was CT's denial of full credit for its residents' taxes paid to other states that created the potential for double taxation. Cert. denied 4/26/04
http://caselaw.lp.findlaw.com/data/ny/cases/app/129opn03.pdf

- ***Racing Association of Central Iowa, et al. v. Fitzgerald,*** No. 01-0011 (Ia. 2/3/04) *Racing Association of Central Iowa, et al. v. Fitzgerald,* Ia. S. Ct., 2/3/04 Despite finding that state and federal constitutions' equal protection clauses were "identical in scope, import and purpose," and a finding by the US Supreme Court that the state taxing scheme which applied a higher tax rate to revenues from slot machines located at race tracks than from slot machines located at riverboats was not in violation of the federal equal protection clause, such scheme was in violation of the state constitution equal protection clause because the tax rate differentiation was based only on the location where the revenue was earned, which was not a legitimate purpose. Although the earlier US Supreme Court analysis under the federal clause was "persuasive, it [was] not binding." Cert. denied 6/7/2004.
http://www.judicial.state.ia.us/supreme/opinions/20040203/01-0011.asp

- ***Conely v. York, Mich.,*** (6th Cir., 9/12/03), S.Ct. No. 03-1361. Suit in federal court contesting the seizure of personal property to satisfy unpaid property taxes was barred by the Tax Injunction Act, which prohibits federal courts from enjoining the "assessment, levy or collection" of a state tax when an efficient remedy exists in state court. An efficient remedy did exist in state court and the fact that taxpayer did not utilize those remedies did not make them inadequate. Cert. denied 6/1/04.

- **South Dakota Dept. of Revenue v. Pourier, d/b/a Muddy Creek Oil and Gas, Inc.,** et al., No. 22221 (S.D., 1/7/04). Pourier, d/b/a/ Muddy Creek Oil and Gas, Inc. v. South Dakota Dept. of Revenue, S.D. S. Ct., 2/26/03. Hayden-Cartwright Act authorizing states to tax gasoline sales on certain "reservations" does not apply to tribal reservations. The court agreed that the tax was imposed on the consumer and thus denied the refund to the importer-seller. But most of the consumers were tribal members, making them eligible for refunds.http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=sd&vol=2003_1091&invol=1
S.D. S. Ct., 1/7/04 The Court held the15-month statute of limitation period for refunds due on motor fuel tax did not deprive Indian taxpayers of due

process as they had a right to seek a refund within a reasonable time. Cert. denied 5/24/04 http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=sd&vol=2004_1229&invol=1

- ***Massachusetts Commissioner of Revenue v. H.J. Wilson Co.,*** 333 F.3d 666 (*Service Merchandise Co, Inc.)* (6th Cir., 6/24/03) S.Ct. No. 03-879. In June of 2004, the 6th Circuit found that taxpayer's adversary suit in bankruptcy court, challenging assessments related to corporate excise tax which were pending at the appellate tax board, and a determination that taxpayer does not owe those taxes in general, was not prohibited under 11th amendment because no sovereign immunity exists as to bankruptcy matters. Cert. denied 5/24/04. http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=6th&navby=case&no=03a0208p

- ***Boivin v. Addison, Vt.*** (Vt., 12/04/03), S.Ct. No. 03-1257. State Supreme Court upheld a Superior Court decision establishing property values for three parcels of real property where the evidence reviewed by the trial court, although in conflict, was sufficient to support the decision. Cert. denied 5/3/04 http://www.vermontjudiciary.org/unpubeo/dec03/eo03236.htm

- ***AT&T Corp. v. Allen,*** (Okla. Civ. App., 6/10/03, unpublished) S.Ct. No. 03-1046. An Oklahoma state court ruled it may take jurisdiction over a breach of contract claim and certify a class action covering taxpayer's customers in 27 states wherein customers are seeking declaratory judgment, injunction and restitution for municipal sales taxes charged by the taxpayer on bills of customer/plaintiffs residing outside municipal jurisdictions. The Oklahoma appellate court affirmed and the state Supreme Court denied review. Cert. denied 4/26/04.

- ***General Mills, Inc. v. Commissioner of Revenue,*** No. SJC-08935 (Ma. 9/15/03) S.Ct. No. 03-1094. The Massachusetts Supreme Judicial Court has held: (1) taxpayer, General Mills, was not unitary with either of its wholly owned subsidiaries, Eddie Bauer and Talbots, despite its provision of lease and revenue bond guarantees, tax preparation, administrative support provided by a "specialty retailing group" staffed by up to eighteen General Mills employees, and other services. Although General Mills shared some officers and directors with the subsidiaries, it was sporadic and they had no involvement in the day-to-day operations of the subsidiaries. (2) Gain realized by General Mills (a DE corp.) on the sale of its Talbots (a MA corp.) stock was treated as a sale of assets by Talbots where General Mills had joined with the purchaser of the stock in making an I.R.C. §338(h)(10) election. Because the state tax base is gross income determined under the I.R.C., diverging from the election would necessitate specific state statutory authority. (3) Talbots' sale of its intangibles to a Delaware holding company, which quickly sold the intangibles to the purchaser of Talbots stock, was found to lack a business purpose and was disregarded under the step-transaction doctrine. The income from the sale of the intangibles was then included in the numerator of the Massachusetts sales factor based on a "cost of performance" analysis which showed that the business operations; such as billing, customer relations and

management; all located in Massachusetts, produced most of the value of the intangibles. Cert. denied 4/5/04.
http://www.masslaw.com/archives/ma/opin/sup/1015003.htm

- ***Mariana v. Fisher,*** 338 F.3d 189 (3rd Cir., 7/30/03) S.Ct. No. 03-806. In July of 2003, the 3rd Circuit affirmed a District Court dismissal of a law suit brought against the Pennsylvania Attorney General charging that the master settlement agreement between large tobacco manufacturers and state attorneys general is in violation of the antitrust provisions in the Sherman Act. The Court held that the state officials were immune from antitrust liability under the *Noerr-Pennington* doctrine whereby private parties are afforded immunity from antitrust liability arising from the act of petitioning for government action or from government action which results from the petitioning. Certiorari denied 2/23/04.
- ***American Trucking Association, Inc. v. Michigan Public Service Commission*** (below: Westlake Transportation, Inc. v Michigan Public Service Commission), 662 N.W.2d 784 (Mich. Ct. App., 3/11/03), S.Ct. No. 03-1320. In reviewing a challenge to a state's annual motor carrier fees of $100 for an interstate certificate of authority to operate, $100 administrative fee for interstate operators, and $10 registration fee for carriers registered out-of-state, the Court held: (1) The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA)'s cap of $10 on per-vehicle registration fees that "participating" States can charge interstate motor carriers, applied to limit the fee charged to such carriers by their state of registration state as well. (2) The $100 administrative fee was a regulatory fee, not a registration fee subject to preemption by the federal law. (3) The intrastate fees were fees and not taxes prohibited by the state constitution. (4) The intrastate and interstate fees which applied only to "for hire" motor carriers and not private carriers did not violate the equal protection clause of the United States and state Constitutions because the legislature's classification bore a rational relation to a legitimate state purpose. (5) The flat, annual intrastate fee imposed on any vehicle which operates intrastate pursuant to a certificate of authority, even if it also travels interstate, affected interstate commerce, and thus, implicated the dormant Commerce Clause. However, any effect the fee had on interstate commerce was incidental and did not rise to the level of discrimination. Petition denied 5/17/04
http://caselaw.lp.findlaw.com/data2/michiganstatecases/appeals/031103/18281.pdf

- ***Angle v. Guinn,*** below *Guinn v. Legislature of the State of Nevada*, No. 41679 (Nv., 7/10/03), rehearing denied (Nv., 9/17/03), S.Ct. No. 03-1037. The 2003 2nd special session of the Nevada state legislature, bound by a 1996 constitutional amendment requiring 2/3 vote for tax increases, grid-locked over school funding in the face of an unprecedented budget crisis. In response to a petition for writ of mandamus filed by the Governor, the Nevada Supreme Court issued a writ directing the legislature to proceed under simple majority rule, finding the procedural requirement of a 2/3 vote must bend in light of the

substantive constitutional requirement to fund schools. The legislature then proceeded to pass a balanced budget by a 2/3 majority. Petition for rehearing was filed by some members of the legislature asking the Court to withdraw its earlier opinion. The Court dismissed that petition for rehearing as moot. Petition denied 3/22/04

Certiorari Pending

- ***Haugen v. Henry County*** 594 S.E.2d 324 (Ga. 3/1/04). A Georgia County had not over-collected a special purpose local option sales tax because, even though the tax proceeds received by the County exceeded the estimated cost of the project, no 'excess' proceeds could exist so long as the project remained incomplete. Petition for cert. filed 5/27/04.
  http://www2.state.ga.us/courts/supreme/pdf/s03a1444.pdf

- ***Moran v. Hibbs*** (Below: *Kerr v. Killian*), 84 P.3d 446 (Ariz., 2/13/04), S.Ct. No. 03-1495 *Kerr v. Killian,* Ariz. S. Ct. 2/13/04 Differential tax treatment of retirement contributions where state "pick ups" contributions whereas the federal government does not "pick up" contributions did not violate Supremacy Clause or 4 U.S.C. § 111 where the statute did not discriminate on its face nor in effect because the distinction was "pick up" vs. not "pick up," not state vs. feds. Petition for cert. filed 5/3/04.
  http://caselaw.lp.findlaw.com/data2/arizonastatecases/sc/2004/cv_03_0110_pr.pdf

- ***Griffin v. Indiana Department of Local Government Finance,*** 794 N.E.2d 1171 (Ind. T.C., 9/9/03), S.Ct. No. 03-1420. A state "hospital care for the indigent" (HCI) property tax rate which was based on an extrapolation of historical HCI costs in each particular county, created a property tax rate that varied from county to county, in violation of the state constitutional provisions requiring uniform and equal taxation. Petition for cert. filed 4/7/04.
  http://www.in.gov/judiciary/opinions/archive/04030201.tgf.html

- ***European Community v. RJR Nabisco, Inc.*** 355 F.3d 123 (2nd Cir., 1/14/04), S.Ct. No. 03-1427. The 2nd Circuit affirmed dismissal of Racketeer Influenced and Corrupt Organizations Act (RICO) actions filed by the European Community, several individual European nations, and certain Departments of the Republic of Colombia against tobacco companies alleging the companies engaged or were complicit in cigarette smuggling and money laundering in the foreign territories. Because the relief sought was based on lost foreign tax revenues and expenditures made in furtherance of enforcing foreign revenue laws, adjudicating the claims would require the court to interpret and enforce foreign revenue laws, thus the claims were foreclosed by the revenue rule, which bars courts from passing upon foreign tax laws. Petition for certiorari filed 4/17/04.
  http://www.ca2.uscourts.gov:81/isysquery/irlc276/2/doc

- ***Ward v. South Carolina***, 590 S.E.2d 30 (S.C. Supreme Ct., 12/8/03), S.Ct. No. 03-1304. Legislation which repealed tax exemption for state retirees and increased benefits did not violate the doctrine of intergovernmental tax immunity with respect to federal employees because there was no direct correlation between the two actions and even if there were, there was no discrimination in taxation based on the source of the compensation. Petition for cert. filed 3/8/04

- ***Lurie Co. v. Cook County Board of Review***, 803 N.E.2nd 55, Ill. App. Ct., 12/16/03. S.Ct. No. 03-1716. Illinois Appellate Court reversed a decision by the Illinois Property Tax Appeals Board, which had decreased taxpayer's property valuation based on a violation of uniformity, because the taxpayer did not raise its uniformity argument in its original appeal. Petition for cert. filed 6/24/04.
  http://www.state.il.us/court/Opinions/AppellateCourt/2003/1stDistrict/December/Html/1013232.htm

- ***Blue Circle, Inc. v. Georgia Department of Revenue*** (Georgia Ct. App. 10/3/03), S.Ct. No. 03-1603. A taxpayer, denied a sales tax refund for industrial materials, was not denied equal protection or due process even though it was entitled to only to a discretionary appeal to Georgia appellate courts while other participants in administrative appeals were afforded a direct appeal. Petition for cert. filed 5/27/04.

VI. New Business

VII. Adjourn

Additional information on this meeting and agenda may be secured from René Blocker, Multistate Tax Commission, 444 North Capitol Street, NW, Suite 425, Washington, D.C. 20001-1538, telephone: (202) 624-8699, fax: (202) 624-8819, rblocker@mtc.gov.